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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 100, MISCELLANEOUS

ARTELL JUNIOR FARLEY,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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I.

COUNTER-STATEMENT OF CASE

Petitioner's statement of the case is neither complete nor impartial, and respondent therefore deems it necessary to present a brief counter-statement of the case.

Petitioner Artell Junior Farley was charged by information in the Pierce County, Washington, Superior Court with the crime of murder in the first degree, consisting in the premeditated slaying of one Flora McFarland on February 21, 1954 in the City of Tacoma, Washington. (Tr. 1).

Inasmuch as he was without funds to obtain counsel, the presiding judge of the Pierce County Superior Court appointed three lawyers of the Tacoma Bar Association to represent him. The attorneys appointed were John D. Cochran of the then firm of Cochran and Cochran, Mr. Wallace B. Hager of the firm of Goodwin and Hicks, and Mr. Nels B. Nelson, Jr. (Tr. 5, 13). Chief counsel for the defense, John D. Cochran, has since been appointed and is now a Judge of the Superior Court of Pierce County. The competency and integrity and the industry of these attorneys in representing the petitioner during the course of this trial cannot be gainsaid.

A plea of not guilty was entered by the petitioner. (Tr. 8) and the issue of his guilt or innocence was presented on June 14, 1954, and thereafter the case continued to trial until June 22 when it was submitted to the jury. A verdict of guilty of murder in the first degree was returned by the jury. (Tr. 59). In addition, a special verdict of "yes" to the interrogation, "Should the death penalty be imposed?" was submitted to the court by this panel. (Tr. 57).

The violent death met by the victim Flora McFarland was discovered on February 22, 1954 by finding her corpse in a pool of water in an abandoned gravel pit. The area in which her body lay bore graphic evidence of a grisly mortal struggle. The condition of this woman's

body, upon discovery, confirms the fact that her slayer employed almost every kind of death-dealing blow available to him. (St. 919, 920). The autopsy physician testified that "from a medical standpoint, this woman died of multiple traumatic injuries, and I would be unable to put my finger on any one of these many, many injuries which she had, and say, 'This is what caused her death,' the reason being that so many of these injuries any one of them, all by itself, could have produced death." (St. 920).

The automobile of the victim was missing after the discovery of the corpse. As a result of a radio alarm an officer of the Roseburg, Oregon Police Department "spotted the car that was given in the description in the dispatch, in Roseburg, Oregon." (St. 685). Thereafter, another Roseburg police officer, after a search, found the petitioner, Artell Farley, in a bowling alley close by where the car was discovered. (St. 693). A thorough examination of the car resulted in the discovery of a 6-inch hunting knife on the rear gravel shield. (St. 704). On the knife were several red stains. (St. 706). The knife was tested for blood, and it was proved by precipitent test to have human blood on it. (St. 948). There was testimony by Dr. Larson that this knife could have caused the injuries on the hands and some of the injuries on the head of the victim, Flora McFarland. (St. 949). The automobile could have caused the injuries to the chest of the deceased's body. (St. 954-5).

Upon questioning, by officers of the Roseburg police department, the petitioner admitted his identity and that he had struck the decedent, he didn't know how many times after an argument concerning her going out with other fellows. (Ex. 73, St. 699-700). He threw his light

blue suit covered with blood under his house and left in her car. In Roseburg, he had called his mother in Tacoma to wire him money. He was waiting for this in the bowling alley when the officers arrested him. (St. 700).

The petitioner left his mother a note before he fled. He said Flora was dead, and that he was sorry but she deserved it. (Ex. 72, St. 899).

A further written confession of the crime was given by the petitioner to officers of the Tacoma Police Department when they questioned him in Roseburg, Oregon. He stated he knew he must have killed Flora from the amount of blood on his clothes. (Ex. 82, St. 897). He explained he knew she (Flora McFarland) was lying about her whereabouts Saturday night and they started arguing. And he hit her very hard. (St. 896). The next thing he admits remembering is that he was home and that he then cleaned up and disposed of his clothes under the house. He then drove to Eugene, Oregon and registered in a hotel under an alias. (St. 897). Proceeding to Roseburg, he stopped to call his mother for money and was arrested. (St. 898).

The scene of the tragedy was dotted with mute evidence of the violence of the accused's attack. Found scattered over a wide area were items of clothing of the victim, blood-stained rocks, and pools of blood. (St. 562-581). The events preceding the death of Flora McFarland are best known by the defendant. But he did not choose to take the stand as a witness in his own behalf. He did give some information in his statements to the police.

Flora McFarland's room-mate and friend, Donna Miller did not know of any plans of marriage between Flora and the defendant. (St. 825, 826). The petitioner himself makes no mention of any such plans. (St. 894-898). But the petitioner had dated the deceased frequently. (St. 805). The night before the murder (Saturday, February 20, 1954) the defendant was to have met Flora at the store. Since he wasn't there Donna Miller and the deceased together went out to see about their car. (St. 802). In his confession the petitioner states that he had a date with Flo that night at eleven o'clock but she didn't show up. (St. 894).

The next day, Sunday, February 21, 1954, Donna Miller and Flora were in their apartment when the defendant came over in the late afternoon. Farley immediately asked the deceased where she had been the night before. They (Farley and Flora McFarland) moved into the kitchen and the exact conversation could not be heard by the witness Donna Miller. But from the tone of what she did hear, it sounded like argument. (St. 810).

The petitioner in his confession tells what he had done done this Sunday afternoon before arriving at the apartment as Donna Miller describes. He got up late and had several beers. When his mother came home at three o'clock he had a beer with her. He told her he was mad at Flora. He told her that Flora had stood him up the night before. (St. 895). Around four o'clock he took a bus to the apartment of Donna Miller and Flora McFarland. The confession of the petitioner says they then had chicken dinner. (St. 895).

Shortly after dinner, the witness Miller mentions the visit of two others. They were Dave Hydok and Bob

Pickernell. Donna did not know them. The defendant did not know them. But Flora did. (St. 812). The defendant in his confession mentions this visit of two fellows, whose names he did not know but who were friends of Donna. (St. 896).

The two girls had plans to go out that evening to the NCO Club and the defendant was told this. (St. 841). Shortly thereafter, Flora told Donna she was going to take Spud, the petitioner, home. His statement says the time was about 7:30 when he and Flora left, with Donna and the other two men still at the apartment. (St. 896). Donna says that Flora, leaving with the petitioner, reminded Donna that she would be right back and that she and Donna would "go on out to the NCO." (St. 812-813). Donna did not see Flora alive again.

The petitioner finishes the story. They (Flora and the petitioner) got in the car. Flora was driving and the petitioner asked her to drive to the gravel pit. She drove the car to the bottom of the hill and parked in front of a gravel bunker. They started arguing about Saturday night. She said she was home but the fellows at the apartment talked about her being at Rocky's. He knew she was lying. (St. 896). The rest has been told.

Following petitioner's conviction the cause was appealed to the Washington State Supreme Court. Sitting en banc, that court affirmed the judgment and sentence on December 1, 1955 (148 Wash. Dec. 10), and denied a petition for rehearing on April 4, 1956. (148 Wash. Dec. 569).

II.

NO FEDERAL QUESTIONS WERE CONSIDERED BELOW

This section of respondent's brief is intended to correct omissions in Section VI of the petition for writ of certiorari.

Petitioner in Paragraph VI entitled "Federal Questions Considered Below" has failed to comply with Supreme Court Rule 23 (f) which provides:

> "If review of the judgment of a state court is sought, the *statement of the case shall also specify the stage in the proceedings in the court of first instance* and in the appellate court, *at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them* (e.g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears* (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.*
> "° ° °" (Emphasis supplied.)

Petitioner has merely stated that the alleged federal questions were presented to the Washington State Supreme Court in assignments of error one through three and eleven and were denied by the State Supreme Court. (Petition for writ of certiorari, section VI, p. 11.)

The first question presented to this court for review by petitioner relates to the voir dire examination of the jury which assertedly prevented a fair trial. In pages 15 to 25 inclusive of the petition for writ of certiorari, petitioner sets out the questions asked by the prosecuting attorney to which objection is now taken. Of the 52 questions and question combinations excerpted by petitioner, objection was taken to only eight in the trial court. (Petition for writ of certiorari, pages 15 to 25 inclusive.) Only three objections were overruled. The three questions, the objections thereto and the court's ruling thereon are set forth:

St. 173

"Q. But if it is shown to you by the evidence, Mr. Hawkes, that this defendant, although he may have had these emotions—I don't know—, to a greater or a lesser degree, nevertheless his reason was not overridden by these emotions—

"MR. COCHRAN: (Interposing.) Now, if your Honor please, I am going to interrupt at this time to state that it seems to me that Counsel is going far afield in his re-examination of the juror, with reference to points that he very well could have covered in his examination at the beginning.

"THE COURT: No, I think not; objection will be overruled."

St. 192

"Q. MR. IRISH: This business of anger once more. I assume there may be something in the case in regard to anger, because of the type of offense this is; because most murders have their basis in anger, do they not?

"A. I imagine—

"MR. COCHRAN: (Interposing.) I am going to object, your Honor, again. Counsel has passed the juror for cause; there is no reason for him to renege.

"The Court: Objection will be overruled."

St. 390

"Q. However, Mrs. Childress, if the very nature of the killing itself indicates in this case that it took a considerable period of time, maybe ten or fifteen minutes or a half hour, depending upon what the evidence discloses, would you be able to consider that very fact in the light of whether the person who perpetrated the crime had meditated?

"MR. COCHRAN: Object to that on the basis that that is a matter that will come before the jury in the closing arguments and it is not proper at this time.

"THE COURT: The objection will be overruled on the basis, however, that the jury must take all circumstances into consideration in the determination of premeditation."

The grounds stated for these three objections did not raise the alleged constitutional question now urged by petitioner.

In short petitioner's first question presented for review in this court, relating to the alleged impropriety of the voir dire examination of the jury was not presented to the trial court nor passed on by the trial court.

This question was presented to the Washington State Supreme Court in assignments of error one, two and three at page 11 of petitioner's brief in that court as follows:

"Comes now appellant herein and assigns as error the following orders, ruling and proceedings in the trial of this cause in the Superior Court:

"1. The orders of the trial judge overruling appellant's objections and permitting the prosecuting attorney on five different occasions to re-open the State's voir dire examination of the veniremen for the purpose of having the last word in his argument on voir dire (St. 173, 192, 209, 210 and 308).

"2. The failure of the trial court to confine the prosecuting attorney to a proper examination of the veniremen. The wide range of improper examination and argument on voir dire must have in fact destroyed the impartiality of the entire jury panel. (Please see the supplement to argument on Errors on Voir Dire, pp. 27 et seq.)

"3. The misconduct of the prosecuting attorney in using the examination of the veniremen as a springboard to argue the cause and thus to prejudice the jury and the jury panel at the outset of the trial. (Please see the supplement to argument on Errors on Voir Dire, pp. 27 et seq.)"

However, the Washington State Supreme Court refused to pass on the merits of this questions on the grounds that the question had not been presented to the trial court. The Washington Supreme Court stated: (148 Wash. Dec. at p. 12)

"Appellant's counsel upon the appeal (who did not try the case) contend appellant should have a new trial, because of the prejudicial errors committed. It took two-and-one-half days to empanel the jury. Appellant's trial counsel adopted the strategy of attributing the crime to jealousy, and zealously attempted to discover a predisposition in the prospective jurors to exercise leniency on that account. These

efforts were countered by the prosecutor's equally zealous attempt to discover an opposite predisposition among the prospective jurors.

"It is the position of appellant's appeal counsel that the prosecutor's examination constituted prejudicial error. *Timely objections were not made to the examination in question.* Defense trial counsel were obviously in no position to object, because their own examination invited the prosecutor to make similar inquiries of the jurors. *Appellant's trial counsel did not exhaust their peremptory challenges and did not challenge the panel.*

"Nevertheless, appellant's appeal counsel contend that there was a burden upon the trial court, even in the absence of objections, to restrict the examination of jurors to its proper limits. *We have repeatedly said that the burden of preventing trial errors rests squarely upon counsel for both sides. Counsel must state the reason why the court is in error in time to enable the court to correct it. A party cannot secrete an error for use upon appeal in case the verdict goes against him.* See *State v. Tharp*, 42 Wn.(2d) 494, 256 P.(2d) 482." (emphasis supplied)

The Washington Supreme Court considered only two questions asked by the prosecuting attorney on the voir dire examination and considered each question proper. Thus the court stated: (148 Wash. Dec. at 13)

"Appellant's appeal counsel contend the state injected the appellant's character in issue when the prosecutor asked a prospective juror:

" 'Have you any information, so called, that came to you by reputation or other discussion in regard to the character of the defendant?'

"Apellant's appeal counsel make the same contention with regard to the prosecutor's question:

"'Would the fact, Mr. Parker, that the defendant or the deceased did things not necessarily in relation to this crime of which you would not socially approve, would you allow that to prejudice yourself, either in favor of the defendant or against him?'

"The question was not intended to put the appellant's character in issue, and did not do so. It was an attempt to discover a predisposition in the prospective juror to react in a certain way to a certain situation. The appellant's trial counsel were probing for the same predisposition in their questions:

"'Now, as that evidence is presented here it probably will be rather revolting to you and completely contrary to your own concepts of living, but will you wait, before forming any opinion whatsoever, until you have heard both sides of the case?'"

Except for these two voir dire questions, the Washington Supreme Court refused to consider petitioner's assignments of error relating to the voir dire examination for the reason that the alleged error was not raised in the trial court.

The second question presented to this court for review relates to the asserted exclusion [illegible] the trial court of evidence relating to petitioner's [illegible]al attitude or condition of mind at the time of th[illegible]ing. (Petition for writ of certiorari p. 5)

Petitioner in Section VI of his petition for writ of certiorari p. 11 again fails to specify when and how the so-called federal question was raised in the court of first instance as required by Supreme Court Rule 23 (f). Nor in his argument on the merits (Section VII of petition for writ of certiorari, p. 26) does petitioner set forth either the questions asked regarding petitioner's mental

condition or the ruling of the trial court thereon. Respondent will herewith supply the omissions.

The question regarding petitioner's mental condition (not his premeditation) asked Dr. H. P. McNutt, psychiatrist, by petitioner's defense counsel appears to have been *withdrawn* by defense counsel and was not actually ruled upon by the trial court. The question asked, the colloquy of counsel and the court and the withdrawal of the question are here set forth:

St. 1022-1029:

"Q. Doctor, would you state whether or not you formed an opinion as to whether or not the specific reaction at the time of the killing was or was not an outbreak of rage and destructive hostility under severe stress?

"MR. O'CONNELL: You can answer that 'yes' or 'no', Doctor.

"A. Yes.

"Q. You did form an opinion. What was that opinion, Doctor?

"MR. O'CONNELL: We will object to that, your Honor, as hearsay.

"THE COURT: Just from your own observation of him and your own examination of him?

"THE WITNESS: Yes, Judge; I formed my opinion, may I say, independent of these other tests, but the tests were confirmatory.

"THE COURT: Objection will be overruled.

"MR. O'CONNELL: We will further object, your Honor, because the proposed testimony, if any, is incompetent, irrelevant and immaterial.

"THE COURT: Objection will be overruled.

"MR. O'CONNELL: Your Honor, could I furnish you authorities on this matter?

"THE COURT: Yes. The Jury will be excused in the care of the bailiff; you may retire to the jury room.

"(Thereupon the Jury left the courtroom and went to the jury room, and the following proceedings took place without the Jury being present.)

"MR. O'CONNELL: As I understand it, your Honor, the issue involved is whether the doctor formed an opinion as to whether at the time of the commission of this murder the defendant was angry, or was in a great rage. I am very greatly surprised that a matter of this kind has ever arisen, because it would seem to me that the defense is attempting to show by evidence other than the testimony of the defendant himself—who is not taking the stand, according to the opening statement—certain circumstances that may have occurred at a date some months previous. I did find, however, on the question asked, a Dr. N. K. Rickles, in 6 Wash.(2d). [*State v. Davis*, 6 Wash. (2d) 696].

"THE COURT: In reference to the question which was asked as to whether he could form premeditation?

"MR. O'CONNELL: That's right.

"THE COURT: And there, they said he could not.

"MR. O'CONNELL: He could not testify about it.

"THE COURT: As to his opinion as to whether he could premeditate it or not.

"MR. O'CONNELL: That's right. Now this, your Honor please, is, I would say, almost identical. It's a question as to what the state of mind and the state of conduct is of the defendant at a given time, which is arrived at by an examination many months later, and is reached by oral examination of the defendant—question and answer type—and observation, by a competent psychiatrist, it is true; but I don't think, if your Honor please, that the law is as far advanced as that—to allow the defense in cases of this nature to be handled by people who have observed the defendant and then come forward and say 'It is my opinion the defendant did this, it is my opinion the defendant did that.' And that, I think, would be what the result of testimony of this type is.

"THE COURT: Let me inquire: Doctor, would you testify and give your opinion as to your own individual examination, or what you learned from the defendant as to what happened on that particular occasion?

"THE WITNESS: Judge, I learned almost everything that was of importance to me from conversation with, and observation of, the defendant. Does that answer your question?

"THE COURT: Are you attempting to give an opinion as to what his condition was on this particular evening?

"THE WITNESS: Well, I think I would feel safe in stating an opinion on that, if the opinion were asked, yes.

"THE COURT: Based upon what?

"THE WITNESS: Upon a quite thorough study of the patient; much more thorough, as I'm sure you

know, than we are able to make, say for a commitment hearing. A very detailed review of his life history and circumstances under which he has felt one way and another, and so on, all of which would support my diagnostic opinion of the patient—or the defendant.

"THE COURT: Are you attempting, in your opinion, to say that he could now have premeditated a murder?

"THE WITNESS: Judge, I did not say at any time that he could or could not premeditate; that's not part of any opinion I have given.

"THE COURT: Your opinion goes to the fact that from your observation of him, and from what he has told you, that it was possible for him to have great anger?

"THE WITNESS: My opinion goes to that fact, perhaps a little beyond it, Judge. I would say certainly beyond it, if I should answer this specific question which has been addressed to me.

"THE COURT: What would your answer be to that particular question?

"THE WITNESS: Well, Judge, I made this a matter of my report, and I—.

"THE COURT: You see, what I'm trying to get away from is that there isn't any question the law is that he cannot . . . that the question of premeditation is a question of fact.

"MR. COCHRAN: We have no quarrel with that, your Honor.

"THE COURT: He can't testify even in his opinion that he could or could not have premeditated, that being purely and simply, according to the Supreme

Court of this State, a question of fact. Now, the reason I'm asking what his opinion is, or what his answer is going to be, I think it will satisy the Court as to whether or not he is attempting to do that. What would your answer be, Doctor?

"THE WITNESS: Judge Johnson, in my written report I didn't touch on premeditation at all; but I did have this sentence, and it was stated there as an opinion, containing the phrase 'I believe.' I said, 'The specific reaction at the time of the killing is, I believe, an outbreak of rage and destructive hostil ity under severe stress.' That is just one sentence of several in that paragraph, but that was apparently the sentence that bears on your request now.

"THE COURT: Well, it seems to me that he is going further than purely an opinion.

"THE WITNESS: Beg pardon?

"THE COURT: I say, it appears to me that the Doctor actually is stating a fact.

"MR. HAGER: Well, if the Court please, we are not asking the question, and do not intend to ask, whether or not the defendant was capable of premeditating the crime here.

"THE COURT: Well, in effect you are asking him that, to a degree, because you are asking the Doctor to determine what his condition was on that particular night. Now, if you want to give him a hypothetical question. . . .

"MR. HAGER: Well, if the Court please, maybe we should withdraw . . . just a moment. (Consulting with Mr. Cochran.) *We will withdraw our question, your Honor, so that it will not be before the Doctor when the jury returns.*

"THE COURT: All right. Do you desire to ask the Doctor another question?

"MR. HAGER: Yes, your Honor.

"MR. O'CONNELL: Are they of such a nature that . . . well, we will have to wait and see.

"MR. COCHRAN: We will make an offer of proof, if you like.

"THE COURT: Well, the ruling will be that he cannot testify as to a matter . . . at least generally . . . cannot testify as to a matter of fact as of that night. *Now, I don' know how the Doctor can testify whether he was or was not angry that night, unless he had the background of a hypothetical question as to what the facts were: but that is up to you.* But the rule is, I think, that he cannot testify as to a matter of fact. He can give his opinion on given facts, but I don't think that he can be expected to testify as to what the facts were on that particular night.

"MR. HAGER: *Well, we have withdrawn it, your Honor—the question.*

"THE COURT: Yes. Well, I am just trying to make an explanation of the ruling.

(At this point, the Jury was called, and returned to the jury box.)

"THE COURT: *The record may show that the last question asked the Doctor has been withdrawn.*

MR. HAGER: Yes, your Honor. And you understand that, Doctor." . . . (Emphasis supplied).

This question was raised in the Washington State Supreme Court by assignment of error 11 at page 14 of petitioner's brief filed in that court as follows:

> "11. The order of the trial court refusing to allow Doctor H. P. McNutt to testify as to the state of mind of the defendant as of the time of the alleged killing (St. 1026)."

The State Supreme Court passed on this assignment of error notwithstanding the fact that the question asked Dr. McNutt appeared to have been withdrawn in the trial court as shown above. The Washington Supreme Court stated: (148 Wash. Dec. at 17)

> "The question involved in the concluding assignment of error was:
>
> "'Doctor, would you state whether or not you formed an opinion as to whether or not *the specific reaction at the time of the killing* was or was not an outbreak of rage and destructive hostility under severe stress?' (Italics ours.)
>
> "It appears from the record that the doctor, whose qualifications are admitted, had examined appellant on three occasions while he was in custody, and had seen the reports of two other doctors' examinations of appellant.
>
> "The purpose of the question here involved was not to elicit a diagnosis of appellant's mental condition as revealed by the examinations. Counsel was trying to rebut the inference of premeditation and intent, which could be drawn from the circumstances of the killing, by having the doctor testify as to a fact with regard to specific mental reaction of appellant at the time he committed the crime. Since the doctor was not present at the murder, he had no testimonial knowledge of appellant's appearance, statements, acts, and demeanor, or the circumstances

surrounding the crime. His diagnosis of appellant's state of mental health, as revealed by subsequent examinations, cannot be related to the particular instant of the crime. Nevertheless, counsel contend that, if a layman can express an opinion as to the mental condition of a defendant at the time of committing a crime, there is even more reason for permitting a doctor to do so. This contention misconceives the Washington rule. In *State v. Gaul*, 88 Wash. 295, 152 Pac. 1029, with regard to a layman's testimony, we said:

" 'The intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence, but may be inferred or gathered from the outward manifestations, by the words or acts of the person entertaining it, and the facts or circumstances surrounding or attendant upon the offense with which he is charged.'

"Accordingly, a layman *who sees the commission of a crime* can describe the acts, the appearance, and demeanor of a defendant, from which inferences as to a defendant's mental processes may be drawn, but a doctor who was not present at a crime has no testimonial knowledge of the circumstances needed to support such inferences. In *State v. Davis*, 6 Wn.(2d) 696, 108 P.(2d) 641, we said:

" 'The witness Dr. Rickles, of course, had no personal knowledge concerning the facts of the case, and his opinion on the question of premeditation or the lack of premeditation was inadmissible.'

"The trial court's ruling was correct."

The Washington Supreme Court passed on an evidence question involving the hearsay rule and not on an issue involving federal due process.

III.

SUMMARY OF ARGUMENT

1. The voir dire examination of the jury which petitioner claims prevented a fair trial was not objected to in the trial court. The Washington Supreme Court refused to consider this alleged error under the recognized procedural rule in Washington that timely objection must be taken in the trial court to permit review in the State Supreme Court. This court therefore has no jurisdiction to review the decision of the Washington court based on this nonfederal ground.

2. Petitioner's second question presented for review relates to a question asked a doctor by his trial counsel regarding petitioner's mental condition at the time of killing. The question was apparently withdrawn before being ruled upon by the trial court. Nonetheless the Washington Supreme Court passed on this question saying the doctor could not state his opinion regarding petitioner's mental condition at a given time since the doctor had no testimonial knowledge needed to support such opinion. This was an application of the hearsay evidence rule and involves no federal question.

3. Petitioner has not shown that the jury was biased as the result of the voir dire examination. The method of conducting a voir dire examination of a jury raises no due process question. In this case the questions asked by the prosecuting attorney were invited by the questions asked by petitioner's trial counsel. This does not raise a due process question.

IV.

ARGUMENT

A.

PETITION FOR WRIT OF CERTIORARI DISCLOSES NO FEDERAL QUESTIONS WERE RAISED IN OR DECIDED BY STATE COURT

Supreme Court Rule 19, "Considerations Governing Review on Certiorari," indicates the character of reasons which will be considered by this Court, as follows:

"* * *

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court. * * *"

Supreme Court Rule 23 (f) provides in part:

"(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely*

and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

° ° °" (Emphasis supplied).

1. Voir Dire Examination By Prosecuting Attorney.

With respect to the first question presented to this court for review, respondent has demonstrated that with unimportant exception the voir dire examination conducted by the prosecuting attorney was not objected to by petitioner's trial counsel. Hence no question, federal or otherwise, was raised in the trial court with reference to this examination. The Supreme Court of Washington refused to pass on the propriety of the voir dire examination (with two minor exceptions) for the reason that petitioner's trial counsel failed to assert the alleged error in the trial court. This decision not to review the alleged error rests clearly on the nonfederal ground stated by the Washington Supreme Court as follows:

"° ° ° We have repeatedly said that the burden of preventing trial errors rests squarely upon counsel for both sides. Counsel must state the reason why the court is in error in time to enable the court to correct it. A party cannot secrete an error for use upon appeal in case the verdict goes against him. ° ° °" (148 Wash. Dec. at 12.)

This Court held in *Edelman v. California*, 344 US 357 at 358, 97 L ed 387, 73 S Ct 293:

"It is clear that this court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state

law. *Hulbert v. Chicago*, 202 US 275, 50 L ed 1026, 26 S Ct 617 (1906); *Mutual Life Ins. Co. v. McGrew*, 188 US 291, 308, 47 L ed 480, 484, 23 S Ct 375, 63, LRA 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below. Aside from state law regarding the scope of review in cases such as this one, we note that California permits affirmance in criminal cases where the appellant fails to appear. It follows that the question whether the vagrancy statute is invalid under the Fourteenth Amendment is not properly before us."

This court has recently held in *Ellis v. Dixon* 349 US 458 at 459, 99 L ed 1231, 75 S Ct 850 that it has no jurisdiction if the decision of the state court *might* have rested on a nonfederal ground. It was there stated:

"The New York Court of Appeals denied petitioner's motion for leave to appeal without stating any ground for its decision. 306 NY 981. In these circumstances we must ascertain whether that court's decision 'might' have rested on a nonfederal ground, for if it did we must decline to take jurisdiction. *Stembridge v. Georgia*, 343 US 541, 547, 96 L ed 1130, 1133, 72 S Ct 834 (1952); see also *Lynch v. New York*, 293 US 52, 54, 79 L ed 191, 192, 55 S Ct 16 (1934).

In the instant case the decision of the Washington Supreme Court clearly rested on a nonfederal ground. The decision is therefor not reviewable in this court. *Loftus v. Illinois*, 334 US 804, 805, 92 L ed 1737, 68 S Ct 1212.

2. Exclusion of Evidence of Petitioner's Mental Condition.

With reference to the second question presented to this court for review, respondent has demonstrated that

the question asked Dr. McNutt regarding petitioner's *mental condition* at the time of killing was apparently withdrawn by petitioner's trial counsel before the trial court ruled on the objection interposed by the prosecuting attorney. The Supreme Court of Washington did nonetheless pass on this question which is specifically:

Can a psychiatrist who examined the petitioner in jail be permitted to state his opinion "as to whether or not the specific reaction at the time of killing was or was not an outbreak of rage and destructive hostility under severe stress?" (St. 1022-1023).

The Washington Supreme Court decided that the answer to such a question is inadmissible. This decision was based on the court's conclusion that:

> "° ° ° A Doctor who was not present at a crime has no testimonial knowledge of the circumstances needed to support such inferences [as to defendant's mental processes]." (148 Wash. Dec. 18).

This decision constituted the adoption by the Washington Supreme Court of a rule of evidence regarding the competence of expert opinion testimony under given circumstances. Such a decision does not call into play the Fourteenth Amendment to the Federal Constitution. This Court stated in *Lisenba v. California*, 314 US 219 at 227, 86 L ed 166, 62 S Ct 280:

> "° ° ° The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State's law."

and at page 228:

> "We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process."

In *Chaplinsky v. New Hampshire*, 315 US 568 at 574, 86 L ed 1031, 62 S Ct 766, the appellant was convicted of violating a state statute making it a crime to address any offensive, derisive or annoying word to a person lawfully in a public place. The state courts refused to admit evidence of provocation for which error was assigned in this Court. This Court held:

> "The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied does not contravene the Fourteenth Amendment."

In *Buchalter v. New York*, 319 US 427 at 430, 87 L ed 1492, 63 S Ct 1129, this Court held:

> "° ° ° [The Fourteenth Amendment] leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party

to bring to the test of a decision in this court every ruling made in the course of a trial in a state court."

In *Stein v. New York*, 346 US 156 at 196, 97 L ed 1522, 73 S Ct 1077, it was stated:

> "° ° ° The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment. ° ° °"

The adoption and application of a hearsay-evidence rule by the Washington Supreme Court requires no review by this Court.

B.

VOIR DIRE EXAMINATION WAS PROPER AND INVOLVES NO QUESTION OF DUE PROCESS

Petitioner in his argument contends that the voir dire examination by the prosecuting attorney prevented the jury from trying the case impartially. He makes no showing that any juror was actually biased. His sole support for such a contention is the statement of prospective juror, Percy Quam, who told the trial court he did not think he could be a fair and impartial juror. (St. 315). The reason for this statement is not given. It may have been that he learned for the first time that the jury might have to return a special verdict of whether or not the death penalty should be inflicted. If it were permissible to speculate on the reason for Mr. Quam's remark the most likely answer may be found in the statement of petitioner's trial counsel, that there would be no denial that petitioner killed the woman. (St. 234).

In *Buchalter v. New York*, 319 US 427 at 430, 87 L ed 1492, 63 S Ct 1129, this court discussed an analogous contention:

> "The petitioners assert that, in view of unfair and lurid newspaper publicity, it was impossible to obtain an impartial jury in the county of trial, and that the rulings of the court denying a change of venue, and on challenges to prospective jurors, resulted in the impanelling of a jury affected with bias. We have examined the record and are unable, as the court below was, to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established. *Though the statute governing the selection of jurors and the court's ruling on challenges are asserted to have worked injustice in the impanelling of a jury such assertion raises no due process question requiring review by this court.*" (Emphasis supplied.)

Without suggesting error on the part of petitioner's trial counsel, it is necessary to emphasize that the features of the prosecution's voir dire examination complained of now were invited by, and were only the natural and legitimate other side of questions put by petitioner's counsel. A few typical questions asked by petitioner's counsel on voir dire are here set forth:

St. 31, 32, 33:

> "Q. Now, Mrs. Clifford, your recognize, I assume, that people aren't perfect, don't you?
>
> "A. I understand that.
>
> "Q. We all must have certain human frailties, is that right?
>
> "A. Certainly.

"Q. Do you believe that one of the frailties that human beings are beset with is jealousy?

"A. Yes.

"Q. And that there is such a thing as jealousy, which is a rather common trait among people?
"A. Yes.

"Q. Well now, if you found that in the evidence presented here that jealousy played an important factor, would that influence you, either for or against that person, because they might be jealous, or have been jealous?

"A. Well, I don't think you should.

Q. Maybe I don't make myself quite clear.

"A. Well, yes you make yourself clear, but I don't think that a man can be judged guilty or innocent on that.

"Q. That would have nothing to do with their guilt or innocence, even though they might be?

"A. Jealousy is no excuse for a crime either, really.

"Q. Jealousy is no excuse for a crime. Could jealousy be an excuse for anger?

"A. Yes, I think so.

"Q. Is there such a thing as jealousy being aroused between people who are in love?

"A. Yes, I suppose.

"Q. And could that jealousy be such that it would arouse a person to extreme anger?

MR. O'CONNELL: Your Honor please, these are mere speculative questions—if the evidence should disclose certain things then would the juror have a feeling.

"THE COURT: I think we are going a little far.

"MR. COCHRAN: I have asked the juror, of course, if the evidence would show that jealousy was shown to be a factor in this case, and that is what I was basing my premise on.

"THE COURT: Well, I think it's going a little far afield. However, I will overrule the objection at this time.

"Q. Well now, you do believe, Mrs. Clifford, that a person could be aroused to extreme anger, and that anger could affect their thinking, do you not?

"A. Oh, I think that is admitted, but I can't base my answer—.

"Q. Do you think a person might do things when under the heat of extreme anger that they might not otherwise do?

"A. I suppose that is admitted too."

° ° °

St. 54:

"Q. Now, part of this evidence that might be presented by the Prosecutor, as we have pointed out, may perhaps be very brutal appearing, maybe even gruesome. Will that fact in any way influence you in your thinking about the ultimate result that you are to arrive at?

"A. No."

° ° °

St. 438:

"O. And possibly that that anger might be such that it would cause a person to forget what he was doing at the moment?

"A. Possibly.

"Q. In other words be a blind rage, you might say?

"A. I have heard of it.

"Q. You have heard of such a thing?

"A. Yes.

"Q. It may not have happened in your experience, but that could be a thing that could occur in a human being, do you think?

"A I believe so."

° ° °

St. 476 and 477:

"Q. You have heard of times of passion, have you not, Mr. Schamalz?

"A. Yes.

"Q. I think you will agree with me that there are emotions involved in that that could range from love to jealousy, isn't that correct?

"A. Yes."

° ° °

The Washington Supreme Court stated in this connection:

> "° ° ° Defense trial counsel were obviously in no position to object, because their own examination invited the prosecutor to make similar inquiries of the jurors. ° ° °" (148 Wash. Dec. at 12).

Petitioner's present counsel states in argument (petition for writ of certiorari, p. 26) that:

> "The case is novel—both sides engaged in strenuous effort to make the jury 'biased their way'. ° ° °"

This Court summarily disposed of an analogous problem in *Buchalter v. New York*, 319 US 427 at 431, 87 L ed 1492, 63 S Ct. 1129, saying:

> "The speeches of counsel for defendants apparently provoked statements by the District Attorney of which petitioners now complain. This does not raise a due process question."

V.

CONCLUSION

This brief opposing the petition for writ of certiorari has not attempted to discuss the merits of the contentions made by petitioner. The petitioner has brought to this Court no federal questions of substance decided by the state court. Specifically, the principal question sought to be raised here, that of the voir dire examination of the jury, was never raised in the trial court and for that reason alone rejected by the Washington Supreme Court

in accordance with Washington rules of procedure. Furthermore, taken at face value, the asserted error does not come within this Court's conception of due process under the Fourteenth Amendment.

The second question presented to this Court for review, relating to the exclusion of testimony of petitioner's mental condition at the time of killing, falls outside the broadest construction of due process. The decision of the state court was merely a ruling on the competency of testimony which was based on hearsay information. Such a decision does not require an exercise of this Court's constitutional jurisdiction.

Petitioner has presented no federal questions to this Court. Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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